Revision: HCFA-PM-94-1 (MB)
FEBRUARY 1994

State/Territory: WISCONSIN

Citation

4.22 Third Party Liability

42 CFR 433.137

(a) The Medicaid agency meets all requirements of:

(1) 42 CFR 433.138 and 433.139.
(2) 42 CFR 433.145 through 433.148.
(3) 42 CFR 433.151 through 433.154.
(4) Sections 1902(a)(25)(H) and (I) of the Act.

1902(a)(25)(H) and (I) of the Act

42 CFR 433.138(f)

(b) ATTACHMENT 4.22-A --

(1) Specifies the frequency with which the data exchanges required in §433.138(d)(1), (d)(3) and (d)(4) and the diagnosis and trauma code edits required in §433.138(e) are conducted;

42 CFR 433.138(g)(1)(ii) and (2)(ii)

(2) Describes the methods the agency uses for meeting the followup requirements contained in §433.138(g)(1)(i) and (g)(2)(i);

42 CFR 433.138(g)(3)(i) and (iii)

(3) Describes the methods the agency uses for following up on information obtained through the State motor vehicle accident report file data exchange required under §433.138(d)(4)(ii) and specifies the time frames for incorporation into the eligibility case file and into its third party data base and third party recovery unit of all information obtained through the followup that identifies legally liable third party resources; and

42 CFR 433.138(g)(4)(i) through (iii)

(4) Describes the methods the agency uses for following up on paid claims identified under §433.138(e) (methods include a procedure for periodically identifying those trauma codes that yield the highest third party collections and giving priority to following up on those codes) and specifies the time frames for incorporation into the eligibility case file and into its third party data base and third party recovery unit of all information obtained through the followup that identifies legally liable third party resources.

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42 CFR 433.139(b)(3)(ii)(A) ___ (c) Providers are required to bill liable third parties when services covered under the plan are furnished to an individual on whose behalf child support enforcement is being carried out by the State IV-D agency.

(d) ATTACHMENT 4.22-B specifies the following:

42 CFR 433.139(b)(3)(ii)(C) (1) The method used in determining a provider's compliance with the third party billing requirements at §433.139(b)(3)(ii)(C).

42 CFR 433.139(f)(2) (2) The threshold amount or other guideline used in determining whether to seek recovery of reimbursement from a liable third party, or the process by which the agency determines that seeking recovery of reimbursement would not be cost effective.

42 CFR 433.139(f)(3) (3) The dollar amount or time period the State uses to accumulate billings from a particular liable third party in making the decision to seek recovery of reimbursement.

42 CFR 447.20 (e) The Medicaid agency ensures that the provider furnishing a service for which a third party is liable follows the restrictions specified in 42 CFR 447.20.

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4.22 (continued)

42 CFR 433.151(a)

(f) The Medicaid agency has written cooperative agreements for the enforcement of rights to and collection of third party benefits assigned to the State as a condition of eligibility for medical assistance with the following: (Check as appropriate.)

___ State title IV-D agency. The requirements of 42 CFR 433.152(b) are met.

___ Other appropriate State agency(s)--

_____

_____

___ Other appropriate agency(s) of another State--

_____

_____

___ Courts and law enforcement officials.

1902(a)(60) of the Act

(g) The Medicaid agency assures that the State has in effect the laws relating to medical child support under section 1908 of the Act.*

1906 of the Act

(h) The Medicaid agency specifies the guidelines used in determining the cost effectiveness of an employer-based group health plan by selecting one of the following.

___ The Secretary's method as provided in the State Medicaid Manual, Section 3910.

_X_ The State provides methods for determining cost effectiveness on ATTACHMENT 4.22-C.

*According to the Wisconsin Attorney General Opinion (attached), Wisconsin cannot comply with these newly enacted requirements because state legislation is needed. Such legislation is under consideration in this legislative session.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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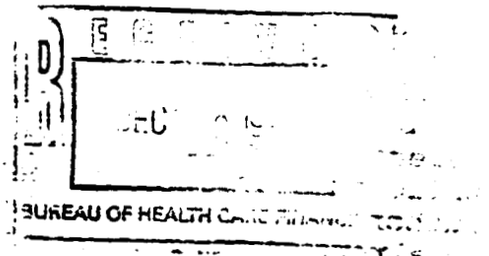

Dear Mr. Whitburn:

You ask whether state legislation is required before certain changes can be implemented under the Wisconsin medical assistance (MA) program.

The Omnibus Budget Reconciliation Act of 1993 (OBRA), Pub. L. No. 103-66, includes a number of changes in the MA program. Your department believes that conforming legislation must be enacted which cannot be accomplished before the effective dates for the federal changes. In order to avoid possible federal fiscal sanctions for non-compliance, the United States Department of Health and Human Services requires a written opinion from the state attorney general indicating that state legislation is needed to implement the federal law changes.

There is no single answer for all of the changes. Therefore, I will discuss each change separately or in logical combination.

Section 13604 of OBRA amends section 1903(v)(2) of the Social Security Act (codified as amended at 42 U.S.C. § 1396b(v)) to provide that emergency services under the MA program for undocumented aliens does not include care and services related to an organ transplant procedure. This change applies as if it was included in OBRA 1986.

Under the Wisconsin MA program, section 49.45(27), Stats., currently provides that a person who is not a United States citizen or an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law may not receive MA benefits except as provided under 8 U.S.C. § 1255a(h)(3) or 42 U.S.C. § 1396b(v). Generally, federal participation in federal-state public assistance programs is conditioned upon the state's offering benefits to all persons who are eligible under federal standards. Burns v. Alcala, 420 U.S. 575, 578 (1975). The state must provide benefits to all individuals who meet the appropriate federal definition and who are

eligible under state standards unless those persons are excluded or assistance is made optional by another provision of the federal act.

At first glance, it would appear that no legislation is necessary. However, the subject of legislation by reference has been addressed before with mixed results. Most state statutes which have adopted federal statutes with the administrative rulings to be made thereunder have been declared unconstitutional for delegating legislative power to an administrative board. Moreover, while the Legislature does not invalidly delegate its legislative authority by adopting a law or rule of Congress if such law or rule is already in existence or operative, it is generally held that the adoption of prospective federal legislation or federal administrative rules constitutes an unconstitutional delegation of legislative power. Attempted incorporation by reference of future federal statutes at the very least is subject to challenge as an unlawful delegation of legislative power. See generally 63 Op. Att'y Gen. 229, 230-31 (1974), and 50 Op. Att'y Gen. 107 (1961); see also the discussion in Niagara of Wis. Paper Corp. v. DNR, 84 Wis. 2d 32, 50-51, 268 N.W.2d 153 (1978), and Dane County Hospital & Home v. LIRC, 125 Wis. 2d 308, 324, 371 N.W.2d 815 (Ct. App. 1985), and cases cited therein.

The current state statute arguably does not constitute an unlawful delegation of legislative power by reference. However, in order to remove all doubt, the best practice might be the reenactment of section 49.45(27) without change in the text or with a clarification that the references address the federal statutes as amended.

The need for further state legislation is clearer under the next two amendments. Section 13611 of OBRA extensively changes section 1917 of the Social Security Act (codified as amended at 42 U.S.C. § 1396p) related to divestment and treatment of certain trusts under the MA program. Section 13612 of OBRA amends the estate recovery provisions of section 1917 of the Social Security Act (codified as amended at 42 U.S.C. § 1396p) including the requirement to recover from estates of persons who received MA after the age of fifty-five years. The first changes are effective with respect to assets disposed of on or after enactment (August 10, 1993) and affect MA provided for services on or after October 1, 1993. States are allowed a period of time to enact legislative changes related to the treatment of trusts. The second changes pertaining to estate recovery are effective October 1, 1993, but again states are allowed a period of time to enact legislative changes.

As the effect of these two changes would be redefinition of existing standards and the establishment of new guidelines where

none presently exist, it is my opinion that state legislation is necessary. I assume that these changes can be made with little controversy and relatively little delay. I further assume that my approach is consistent with this observation of the court in Will v. H&SS Department, 44 Wis. 2d 507, 515, 171 N.W.2d 378 (1969):

> The state plan is not some vague or formless set of regulations. It consists of the state legislation and administrative rules and regulations enacted pursuant thereto. The state legislation and regulations do not have added to them every suggestion in an earlier-issued federal handbook put out to inform states as to what they should include in their plan.
>
> Earlier attempts to incorporate by reference federal statutory or regulatory changes within one of our state manuals without specific legislation or valid administrative rules have been held invalid. Based upon past experience, the MA Handbook often is used to declare your department's interpretation of federal and state MA statutes. It is my opinion that if your department is to make such a determination and wishes to use the standards thus developed to determine MA eligibility, it must do so by means of an administrative rule adopted under chapter 227 and under the state statute which specifically addresses the new eligibility requirements or conditions. Various manual provisions have been declared invalid and without effect because they were not validly adopted as rules. For example, see Wis. Elec. Power Co. v. DNR, 93 Wis. 2d 222, 287 N.W.2d 113 (1980); Dane County v. H&SS Dept., 79 Wis. 2d 323, 255 N.W.2d 539 (1977).

I am satisfied that the current state statutes relating to divestment and treatment of trusts differ substantially from these extensive federal changes. For example, compare sections 49.45(17) and 49.45(23) and the administrative rules promulgated thereunder with the new federal provisions. In order to provide fair and accurate notice of eligibility requirements, the state statutes and rules should be amended. Resort to the federal statute or an attempt to make later state legislation retroactive to the federal enactment date could result in a constitutional challenge for creating a right against an applicant or recipient of aid or his estate which was not existent at the time the aid was received. See Estate of Peterson, 66 Wis. 2d 535, 538, 543, 225 N.W.2d 644 (1975).

This latter prospect is even truer under the estate recovery provisions for which we presently have no similar state law. It will be necessary to amend section 49.496 or create a new state statute.

Section 13622 of OBRA amends section 1902(a)(25) of the Social Security Act (codified as amended at 42 U.S.C. § 1396a(a)(25)) to require states to prohibit insurers (including group health plans under ERISA, service benefit plans and HMOs) from taking an individual's MA eligibility into account in enrolling the individual or making payments to or on behalf of the individual. It also requires that states have subrogation rights. These changes are effective October 1, 1993, but states are allowed a period of time to enact legislative changes.

Section 49.65 already addresses third party liability including state subrogation rights. However, these changes anticipate changes and coordination in insurance statutes as well as public assistance statutes. It is my opinion that this effort also will require additional state legislation at least to the extent of cross-referencing the requirements and limitations.

The next two changes pertain to child support and paternity. Section 13623 of OBRA amends section 1902(a) (codified as amended at 42 U.S.C. § 1396a(a)) and creates section 1908 of the Social Security Act to require states to ensure that insurers and employers carry out court or administrative orders for medical child support. These changes are effective April 1, 1994, but states are allowed a period of time to enact legislative changes. Section 13721 of OBRA amends section 452(g) of the Social Security Act (codified as amended at 42 U.S.C. § 652(g)) to raise the standards (shorten the time limits) for paternity establishment and requiring paternity determination by acknowledgment without establishing paternity by adjudication.

It is arguable that insurers and employers now are required to carry out court or administrative orders for medical child support, even though the medical aspect is not always stated specifically, under sections 632.897(10), 767.25, 767.265 and 767.51. In order to avoid any ambiguity, however, these statutes should be amended to the extent necessary to make it clear that medical child support orders should be so carried out. These changes should be relatively simple, and I note that the federal changes are not effective until April 1, 1994.

I should note in passing my concern that some of these changes implicate other persons or agencies outside your department. There also are questions raised of whether federal preemption is intended and appropriate. The ultimate question is whether present Wisconsin law applies to all cases anticipated in the federal legislation.

As only one example, there is the issue of the impact of ERISA under those changes applicable to all ERISA employers. It is not clear whether the federal change automatically covers and binds all

employers and ERISA insurers. These concepts and types of changes are sufficiently pervasive to warrant care in their enactment and implementation. Returning again to the specific issue of medical child support, this change would require additional amendments to insurance regulatory laws and creation of some new provisions where none now exist.

The portion of OBRA on state paternity establishment programs adopts performance standards. Rather than creating or amending a state statute to parallel a federal requirement, these changes necessitate assurance that all state statutes pertaining to the establishment of paternity operate together to achieve the desired performance standards. As the single state agency designated to establish and supervise such a statewide program under section 46.25, your department's Bureau of Child Support is in the best position to determine whether these standards can be met under existing statutes or whether performance can be enhanced only by imposing additional requirements upon the county agencies implementing the child support and paternity establishment program.

However, I will share with you some of my own observations. At present paternity proceedings require a court appearance and certain built-in scheduling delays. Under this system it is not possible to meet the proposed time limits. Instead it will be necessary to find a way in which persons can acknowledge paternity without a court appearance while at the same time not compromising any of their rights.

Finally, section 13731 of OBRA amends section 1616(d) of the Social Security Act (codified as amended at 42 U.S.C. § 1382e(d)) to charge states a user fee for the federal administration of state supplemental SSI benefits. The change is effective for payments made for calendar months beginning October 1, 1993.

Currently the only related appropriation is found in section 20.435(7)(ed), but it can only be used for benefit costs. As a new expenditure, it is my opinion that this change will necessitate a separate appropriation before payments can be made.

I am not unmindful of the fact that some of these changes expand or improve MA coverage to the benefit, rather than to the detriment, of applicants and recipients or effect changes that are at least neutral in their content. However, it still is my opinion that state legislation is required or at least advisable before most or all of these federal changes can be fully implemented for the reasons already expressed unless the federal agency mandates in clear language an immediate revision of your state plan and manuals.

Although there always is a possibility that such changes might be upheld upon challenge from whatever source through the incorporation by reference of the federal statutes as amended or created, the experience within this office is that such a result is far from assured. Therefore, state legislation is required at the very least to assure consistent and effective implementation of these provisions.

Sincerely,

James E. Doyle
Attorney General

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